

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANDREW E. EVANS, JR.

Claimant

VS.

A-1 STAFFING

Respondent

AND

ST. PAUL TRAVELERS

Insurance Carrier

)
)
)
)
)
)
)
)
)
)
)
)

Docket Nos. 1,010,708
& 1,010,709

ORDER

Respondent and its insurance carrier appealed the November 15, 2006, Award entered by Administrative Law Judge Robert H. Foerschler. The Workers Compensation Board heard oral argument on February 6, 2007.

APPEARANCES

Joseph K. Lewis of St. Joseph, Missouri, and Davy C. Walker of Kansas City, Kansas, appeared for claimant. Timothy G. Lutz of Overland Park, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The record considered by the Board and the parties' stipulations are listed in the Award.

ISSUES

Docket No. 1,010,709 is a claim for a March 15, 2003, right shoulder injury. And Docket No. 1,010,708 is a claim for an April 25, 2003, neck and back injury. In the November 15, 2006, Award, Judge Foerschler determined claimant sustained a 10 percent functional impairment for claimant's March 2003 right shoulder injury and a 10 percent whole person functional impairment for the alleged April 2003 back injury. Although claimant alleged two separate, distinct accidents, Judge Foerschler combined the

functional impairment ratings from the two accidents and awarded claimant permanent disability benefits for a 15 percent whole person functional impairment.

Respondent and its insurance carrier contend Judge Foerschler erred. Regarding the March 2003 right shoulder injury, respondent and its insurance carrier argue: (1) claimant did not provide respondent with timely notice of the March 15, 2003, accident and, therefore, this claim should be denied; (2) claimant sustained a later injury to his right shoulder on April 2, 2003, and, therefore, he failed to prove the extent of impairment from his alleged March 15, 2003, accident; and (3) claimant should be considered a part-time employee and, therefore, his average weekly wage was \$406.05.

Regarding the alleged April 2003 accident, respondent and its insurance carrier argue: (1) the accident did not happen and, therefore, this claim should be denied; (2) claimant must be considered a part-time employee and, therefore, his average weekly wage for this alleged accident should be \$406.05; (3) claimant has failed to prove he sustained any permanent injury or permanent impairment from this alleged accident; (4) claimant's request for the payment of outstanding medical bills should be denied because the accident did not occur and because claimant failed to introduce those medical bills into the record; and (5) the request for payment of outstanding medical bills from January 2005 that were related to an overdose should be denied as those expenses are not related to the alleged April 2003 accident.

In summary, respondent and its insurance carrier request the Board to reverse the November 15, 2006, Award and deny both claims. In the alternative, they request the Board to modify the Award and reduce the benefits granted.

Conversely, claimant contends the Award should be affirmed.

The issues before the Board on this appeal are:

Docket No. 1,010,709

1. Did claimant provide respondent timely notice of his March 15, 2003, accident?
2. If so, what is the nature and extent of claimant's impairment?
3. What is claimant's average weekly wage for that accident?

Docket No. 1,010,708

1. Did claimant sustain an accidental injury on April 25, 2003, that arose out of and in the course of his employment with respondent?

2. If so, what is the nature and extent of claimant's impairment, if any?
3. What is claimant's average weekly wage for that accident?
4. Are respondent and its insurance carrier responsible for any of claimant's outstanding medical bills?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes the November 15, 2006, Award should be modified.

Claimant was employed by respondent, a temporary employment agency. In March and April 2003, claimant was working at Meridian Rail where he had been assigned to work for several months. At Meridian Rail claimant performed heavy manual labor as he tested reconditioned train wheels and pulled bearings from train wheels.

On approximately March 15, 2003, while pushing a set of train wheels to his testing station, claimant experienced a sharp shooting pain that went from his right shoulder up into his neck and down into his back. Claimant testified that he immediately stopped working and reported the incident to Rafael, his supervisor.¹ According to claimant, Rafael advised him to continue working but claimant would be sent to a doctor, if it happened again.

Claimant, who is a poor historian, testified he thought he was sent to the doctor the day after the incident. But the records that were introduced into evidence indicate a somewhat different history. Records from Occupational Health Services, where claimant was sent for medical treatment, show that his first appointment at that clinic was April 7, 2003. Occupational Health Services recorded the following history in its April 7, 2003, notes:

This 35-year-old Ultrasound Technician from Meridian Rail comes in complaining of pain in his right shoulder. He states that he has been having pain in the right shoulder for the last three to four weeks but progressively increased last week and he had an episode on 04/02/03 whenever he was demounting a bearing and in this process he actually pulled significantly hard and it made his shoulder pain worse.

He describes his mechanism of injury being more of a[n] irritation in the shoulder coming from a pushing of the rail wheels in a forward direction reaching with his arms extended far to the sides pushing on the wheels and he describes there was

¹ Evans Depo. (July 12, 2006) at 200.

a dip in one of the rails where they were doing their testing, that this created more resistance on the right than the left and he thinks this is where his irritation in the right shoulder began.²

Moreover, claimant prepared an Employee's Accident Report that bears an April 10, 2003, signature date. That report indicates that on March 13, 2003, claimant reported to his supervisor Rafael that he had injured his right shoulder on or about March 12, 2003, while pushing train wheels to the testing station.

Occupational Health Services provided claimant with medications and gave him work restrictions. Claimant's testimony is uncontradicted that he discussed his restrictions with both respondent and Meridian Rail and was told that he had to do his regular work activities or he would be terminated. Consequently, claimant continued performing his regular work duties despite his right shoulder pain.

But claimant's work at Meridian Rail ended on April 25, 2003, when he was allegedly ejected from a forklift after striking a van in Meridian Rail's parking lot. Claimant was taken by ambulance to the University of Kansas Medical Center for emergency treatment by the medical center's trauma team. Claimant complained of significantly decreased sensation in his legs and paresthesias in his arms. Consequently, claimant spent the next day or two in the medical center being tested for a possible head and spine injury. CT scans of the head and cervical spine were negative for any significant injury. Likewise, MRI scans of claimant's cervical, thoracic, and lumbar spine did not show any objective evidence of injury. On either April 27 or 28, 2003, claimant was discharged home.

In May 2003, claimant followed-up with the medical center's trauma clinic. The doctor who saw claimant thought claimant might have some lumbar strain and the doctor, therefore, recommended analgesics. When claimant returned to the medical center's trauma clinic in June 2003, he was continuing to complain of right leg weakness and he was prescribed medications. It was also recommended that claimant return to work after being cleared by the medical center's neurology and rehabilitation units.

Meanwhile, Occupational Health Services had referred claimant to orthopedic surgeon Dr. Steven Smith for treatment of his right shoulder. Claimant first saw Dr. Smith on June 2, 2003, when the doctor diagnosed impingement syndrome and distal clavicle osteolysis. The doctor injected claimant's shoulder and prescribed medications. When claimant saw Dr. Smith for the second time on June 27, 2003, the doctor recommended right shoulder arthroscopy with subacromial decompression and excision of the distal clavicle.

² Evans Depo. (May 26, 2005), Ex. 5.

But that was the last time Dr. Smith saw claimant.³ Respondent's insurance carrier advised Dr. Smith it would not authorize claimant's surgery. In addition, the doctor was advised that claimant was alleging another accident and resulting paralysis that could not be verified by physical findings. The doctor was also advised that claimant had been dragging his right leg at the University of Kansas Medical Center. It is not known whether the doctor was also told that in early July 2003 the medical center noted claimant was able to walk without either a crutch or cane.⁴ Nonetheless, Dr. Smith concluded he did not want to treat claimant any longer. The doctor, however, recommended to respondent's insurance carrier that claimant be referred to the University of Kansas Medical Center for any further right shoulder treatment.

On July 2, 2003, claimant had an appointment with the neurology department at the University of Kansas Medical Center. The records from that visit indicate claimant complained of low back pain and paresthesias in his right lower extremity, which might have been caused by a spinal cord injury. Earlier notes from the medical center, however, indicate claimant's physical examinations were not consistent with known neurologic patterns and that the doctors suspected a conversion disorder.

The July 2003 appointment at the University of Kansas Medical Center would be the last treatment claimant received for his neck or back until either late January or February 2005, as addressed below.

After last seeing Dr. Smith in June 2003, claimant went almost a year without seeing another doctor for his right shoulder until he began treatment with Dr. David J. Clymer in May 2004. The doctor found a mild impingement syndrome in claimant's right shoulder, mild rotator cuff tendinitis, and some irritability of the acromioclavicular joint. Although Dr. Clymer had been instructed not to treat either claimant's neck or back, the doctor concluded claimant's gait and stance appeared normal and claimant's lower extremities appeared normal. The doctor did note, however, that claimant complained of neck discomfort out onto his shoulder and that he had soft tissue irritability in his back.

Claimant desired the shoulder surgery that Dr. Smith had suggested. Dr. Clymer, however, did not believe the surgery offered a high likelihood of success. Nevertheless, in early September 2004 Dr. Clymer decompressed claimant's right shoulder and resected the distal clavicle. Unfortunately, the surgery provided claimant with little benefit.

³ Smith Depo. at 16.

⁴ Evans Depo. (May 26, 2005) at 114.

The next milestone in claimant's medical treatment occurred in January 2005, when claimant was taken to the University of Kansas Medical Center by ambulance after being found unresponsive. During this medical center stay, claimant voiced physical complaints and, therefore, he was scheduled for an orthopedic spine consultation and nerve conduction studies. The nerve conduction studies indicated claimant had right arm and right leg abnormalities associated with the seventh and eight cervical intervertebral space and the fifth lumbar and first sacral intervertebral space. In either February or March 2005, claimant received injections in his cervical and lumbar spine.

In approximately July 2005, claimant moved to Colorado where he works through temporary employment agencies. According to claimant, his condition has improved since May 2005 as he began walking and doing exercises. Also according to claimant, his condition had improved to such extent that when he testified in July 2006 he did not need a cane to walk.

Two doctors testified regarding claimant's present impairment. Respondent and its insurance carrier referred claimant back to Dr. Clymer for a final evaluation and impairment rating. Claimant, who now distrusts Dr. Clymer, met with the doctor in May 2005. Dr. Clymer rated claimant as having a five percent functional impairment to the right upper extremity under the *AMA Guides*⁵ (4th ed.) due to the right shoulder injury. But the doctor could not find any evidence of an injury from the alleged April 25, 2003, accident involving the neck and back and, therefore, the doctor concluded claimant had no impairment that could be attributed to that alleged accident. Dr. Clymer's examination revealed no back spasm, no muscle atrophy, and no neurologic deficits. Conversely, the examination did reveal inconsistent range of motion and symptom magnification. In short, the doctor could find no physiological reason to explain claimant's neck and back complaints.⁶

At claimant's attorney's request, Dr. Michael J. Poppa examined claimant in late June 2006. Regarding claimant's right shoulder, Dr. Poppa diagnosed a shoulder strain, supraspinatus tendinosis, and an impingement that required surgery. Using the *AMA Guides* (4th ed.), the doctor rated claimant as having a 29 percent impairment to his right upper extremity, which the doctor related to claimant's alleged March 2003 accident.

Regarding the injuries to claimant's neck that he allegedly sustained in the April 2003 forklift incident, Dr. Poppa diagnosed claimant with cervicalgia, strain, spasm, disc bulge and cervical upper extremity radiculopathy and myofascitis. Accordingly, the doctor rated claimant as having a 15 percent whole person functional impairment due to the neck

⁵ American Medical Association, *Guides to the Evaluation of Permanent Impairment*.

⁶ Clymer Depo. at 34.

injury. In addition, the doctor concluded claimant sustained a 10 percent whole person functional impairment due to the injury to his lumbar spine, which Dr. Poppa diagnosed as being a combination of strain and aggravation of both preexisting facet disease and preexisting neuroforaminal stenosis. Combining the 10 percent and 15 percent ratings, Dr. Poppa concluded claimant sustained a 24 percent whole person functional impairment due to the April 2003 forklift accident. Dr. Poppa testified that he rated claimant using the *AMA Guides* (4th ed.).

Although the Judge addressed both of claimant's alleged accidents in one Award, claimant has two separate and distinct claims that should be considered individually. Accordingly, the claim for the March 15, 2003, accident will be addressed followed by the claim for the April 25, 2003, accident.

Docket No. 1,010,709 – March 15, 2003, accident

Notice

Claimant's testimony is uncontradicted that he immediately stopped work and reported his right shoulder pain to his supervisor, Rafael, on or about March 15, 2003, when he experienced pain while pushing train wheels to his testing station. Rafael did not testify to contradict claimant's testimony. Moreover, claimant's testimony that he promptly reported his right shoulder injury to Rafael is supported by the accident report claimant later prepared. As found above, that report indicated on March 13, 2003, claimant reported to Rafael that he had injured his right shoulder on or about March 12, 2003, pushing train wheels to his testing station.

The Board finds claimant's injury occurred on or about March 15, 2003, and that claimant provided notice within 10 days of the accident as required by K.S.A. 44-520.

Nature and extent of injury

As indicated above, Dr. Clymer rated claimant as having a five percent functional impairment to his right upper extremity and Dr. Poppa rated claimant as having a 29 percent functional impairment. Judge Foerschler determined claimant sustained a 10 percent right upper extremity impairment at the shoulder, which claimant has asked the Board to affirm.

The Board affirms the Judge's finding that claimant has sustained a 10 percent impairment to his right upper extremity. The Board rejects respondent and its insurance carrier's argument that claimant sustained a subsequent injury while removing bearings from a train wheel at work and, therefore, he should be denied permanent disability benefits for the March 15, 2003, injury. First, the evidence fails to establish that the

April 2003 wheel bearing incident resulted in claimant's functional impairment. Neither Dr. Clymer nor Dr. Poppa testified to such fact. Second, Dr. Poppa's testimony is persuasive that the incident removing the wheel bearing was probably insignificant as claimant was already experiencing increased pain in his right shoulder when that incident occurred.

Average weekly wage

Not a lot of evidence was presented regarding claimant's average weekly wage. Claimant was not asked if he was expected to work 40 or more hours per week and no witness testified on behalf of respondent regarding the wage issue. Moreover, claimant's testimony regarding his hourly wage and his estimate that he worked on average approximately 50 hours per week was not borne out by the document entitled Payroll Summary that respondent and its insurance carrier introduced. Instead, the Payroll Summary indicates claimant was being paid \$13.15 per hour on the date of accident.

The Payroll Summary indicates claimant was paid weekly and that he was paid a total of 19 checks, with the first check dated January 3, 2003, for 15 hours of work and the second check dated January 5, 2003, for 24 hours of work. In addition, the Payroll Summary shows claimant was given a check dated April 17, 2003, for \$13.85 but no hours are shown as being related to that payment. The last check was dated April 27, 2003, for 29.50 hours of work. Excluding the first two checks and the last check (as they represent only partial weeks) and excluding the April 17, 2003, check (as it is not shown to relate to any hours worked), 15 checks remain. And out of those remaining 15 weeks, claimant had 12 weeks in which he worked at least 40 hours. Out of those 12 weeks, claimant also had six weeks in which he worked overtime. And in one of those six weeks, he worked five hours of overtime and what appears to be 7.5 hours of double-time.

Based upon the hours that claimant actually worked, the Board finds that claimant was regularly expected to work 40 hours per week, which would make him a full-time employee under the Workers Compensation Act.⁷ Therefore, claimant's average weekly wage is to be based upon a 40-hour workweek. The Board finds claimant's regular earnings were \$526 (40 hours x \$13.15 per hour). And the Board finds claimant's average weekly overtime before the March 15, 2003, accident was \$41.24 (23 hours x \$13.15 per hour x 1½ ÷ 11 weeks) and his average weekly double-time before the accident was \$17.93 (7.5 hours x \$13.15 x 2 ÷ 11 weeks). Consequently, claimant's average weekly wage for the March 15, 2003, accident was \$585.17. And claimant's permanent partial disability benefits and temporary total disability benefits should be modified based upon that wage.

⁷ See K.S.A. 2002 Supp. 44-511.

Docket No. 1,010,708 – April 25, 2003, accident

The April 25, 2003, accident

No one witnessed claimant's alleged April 25, 2003, accident. Respondent and its insurance carrier have denied that an accident occurred. Instead, at oral argument before the Board, respondent and its insurance carrier argued that claimant had staged the incident. They propounded the theory that claimant climbed down off the forklift after running it into a van and then laid down pretending to be injured.

Claimant testified he had been taking medications before the accident occurred and that his supervisor sent him outside for some fresh air after finding him asleep at his testing station. Claimant also testified that his supervisor told him to move some train wheels with the forklift. According to claimant, he recalls driving the forklift outside the building and then waking up at the medical center.

Claimant's testimony is somewhat contrary to the ambulance report that was prepared in connection with claimant's alleged accident. That report indicates claimant was found lying on his back but he was verbally responsive and complaining of neck and back pain and saying that his body felt funny all over. And the University of Kansas Medical Center records from the night of the accident indicate claimant was initially alert and cooperative but he was unable to answer questions fully at some times but could at other times. Those records also indicated that claimant slowly improved during his hospitalization.

Considering the entire record, the Board finds it is more probably true than not that claimant did sustain an accident on April 25, 2003, when he was driving a forklift. Indeed, the records from the University of Kansas Medical Center indicate claimant was somewhat disoriented the night he was taken to the medical center. A close examination of those records does not indicate that the physicians at the medical center believed that claimant was pretending that he had been injured. On the other hand, the medical evidence indicates that on the day of the accident claimant was taking a medication that caused drowsiness, which claimant believes caused his accident.

Nature and extent of injury

Claimant contends his neck, back, and right leg symptoms have not resolved since the April 25, 2003, accident. Claimant did not present the testimony of any physician from the University of Kansas Medical Center regarding a diagnosis when he was discharged. Moreover, claimant did not present the testimony from any of the physicians from the medical center that have more recently provided him treatment. Accordingly, the Board is left with the medical center records that indicate the trauma team was concerned about

a possible spine injury. On the other hand, because the various scans were coming back normal and claimant's condition was improving the doctors considered a conversion disorder.

In addition, Dr. Smith testified that he reviewed the University of Kansas Medical Center records and they were entirely inconsistent with the way claimant was acting in his office. And Dr. Clymer did not help claimant's cause when he testified he was unable to find any spasm in claimant's back, neurologic deficits in the lower extremities or muscle atrophy but, instead, claimant had inconsistent range of motion, giveaway weakness, and symptom magnification.

The Board finds claimant has failed to prove he sustained any permanent injury or permanent impairment as a result of the April 25, 2003, accident. Accordingly, claimant's request for permanent partial general disability benefits for this accident must be denied. The Board has carefully considered Dr. Poppa's opinions regarding claimant's neck and back impairments but the Board is not persuaded considering Dr. Clymer's findings and the various tests performed at the University of Kansas Medical Center that were normal. In addition, it appears Dr. Poppa performs several medical examinations each week for claimant's attorney's office and, therefore, the doctor's opinions must be considered in that context.

The Board is aware that claimant attempted to introduce through another doctor the letters from doctors from the University of Kansas Medical Center that included the doctors' diagnoses. Respondent and its insurance carrier's attorney lodged an objection to their admission. That objection should be sustained. Opinions in records from health care providers should not be considered competent evidence without supporting testimony.⁸

Outstanding medical bills

Claimant has incurred several thousand dollars in expenses at the University of Kansas Medical Center. Those bills were not offered into evidence but they were shown to Dr. Poppa to obtain his opinion regarding their reasonableness.

The Board finds respondent and its insurance carrier are responsible for paying the medical expenses for claimant's April 25, 2003, emergency room visit, his hospitalization, and follow-up treatment through July 2, 2003. Of course, respondent and its insurance carrier's responsibility is limited to those expenses as allowed by the Division of Workers Compensation fee schedule.

⁸ See K.S.A. 44-519.

The medical expenses for the January 2005 emergency room visit and hospitalization at the University of Kansas Medical Center are denied. Respondent and its insurance carrier presented the testimony of David Roberts, Ph.D., who reviewed claimant's medical records and testified that those records did not disclose either signs or treatment that were consistent with either an overdose or seizure from Talwin or other medication claimant had been prescribed as a result of his April 2003 accident. Claimant did not present any evidence to contradict this evidence. Accordingly, the Board finds claimant failed to prove that the medical bills he incurred in January 2005 were related to either his March or April 2003 accidents.

In addition, the Board finds that claimant has failed to prove that any medical treatment that he received at the University of Kansas Medical Center after the January 2005 emergency room visit and hospitalization was related to either of his accidents. Consequently, the Board must deny claimant's request for payment of those medical expenses claimant incurred at the University of Kansas Medical Center in January 2005 or afterwards.

Average weekly wage

Based upon the above, the average weekly wage issue regarding the April 25, 2003, accident is rendered moot.

The parties introduced many documents that have little, if any, evidentiary value. For future reference, the parties are reminded and encouraged to introduce only those records that are material to the issues. To do otherwise unnecessarily burdens the record for the administrative law judge, this Board and the appellate courts.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.⁹ Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

AWARD

WHEREFORE, the Board modifies the November 15, 2006, Award, as follows:

⁹ K.S.A. 2006 Supp. 44-555c(k).

Docket No. 1,010,709

Andrew E. Evans, Jr., is granted compensation from A-1 Staffing and its insurance carrier for an accident on or about March 15, 2003, and the resulting disability. Based upon an average weekly wage of \$585.17, Mr. Evans is entitled to receive 17.33 weeks of temporary total disability benefits at \$390.13 per week, or \$6,760.95, plus 20.77 weeks of permanent partial disability benefits at \$390.13 per week, or \$8,103, for a 10 percent permanent partial disability, making a total award of \$14,863.95, which is all due and owing less any amounts previously paid.

Docket No. 1,010,708

Claimant's request for permanent disability benefits for the April 25, 2003, accident is denied.

Respondent and its insurance carrier are responsible for paying the medical expenses for claimant's April 25, 2003, accident, including the April 25, 2003, emergency room visit and related hospitalization, and follow-up visits and treatment through July 2, 2003, subject to the Division of Workers Compensation fee schedule.

Claimant's request for payment of the medical expenses claimant incurred at the University of Kansas Medical Center in January 2005, including the January 2005 emergency room visit, or afterwards is denied.

Claimant is entitled to unauthorized medical benefits up to the statutory maximum.

Future medical benefits may be considered upon proper application to the Director.

The record does not contain a written fee agreement between claimant and his attorney. K.S.A. 44-536(b) requires the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee in this matter, counsel must submit the written agreement to the Judge for approval.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

IT IS SO ORDERED.

Dated this ____ day of April, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Joseph K. Lewis, Attorney for Claimant
Davy C. Walker, Attorney for Claimant
Timothy G. Lutz, Attorney for Respondent and its Insurance Carrier
Robert H. Foerschler, Administrative Law Judge